



COPY

March 3, 2008

Gardner Brownlee  
District Judge (Retired)  
17474 Hwy 93 N.  
Florence, MT 59833

RECEIVED

MAR 12 2008

Ravalli County Commissioners

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RE: Missoula Fire District

Dear Judge Brownlee,

Out of respect for you personally and for your long history of public service, I am again responding to your allegations concerning the Missoula Rural Fire District.

In **July 1953** the Board of County Commissioners of Roosevelt County established a Rural Fire District following the procedure set out in section 11-2008 as amended by Chapter 75, Laws of 1953. ( see Great Northern Railway Co. v Roosevelt County 134 Mont. 355, 356, 332 P2d 501, 502 (1958) ).

At the time the Roosevelt County Commissioners acted to create the rural fire district, section 11-2008 RCM 1947 permitted the County Commissioners to establish a rural fire district without giving notice to property owners and without giving property owners any opportunity to be heard and to offer objections to the creation of the district before the district was created. Great Northern Railroad, supra, 134 Mont at 357, 332 P2d at 502.

The Great Northern Railroad Company brought an action in **January 1954** alleging among other grounds that the **1953** version of 11-2008 failed to afford interested property owners with notice and an opportunity to be heard. The Supreme Court agreed with the position and affirmed the district court judgment which found the **1953** creation of the fire district in question to be unconstitutional.

The basis for the holding that the 1953 version of section 11-2008 was unconstitutional was that the tax to support the district was in the nature of a special assessment (Great Northern Railroad 134 Mont at 359, 332 P2d at 503) and that the imposition of a special assessment without notice and an opportunity to be heard violated due process under both the Montana and United States Constitutions. (Great Northern Railroad 134 Mont. at 359, 332 P2d at 503)

In 1957, while Great Northern Railroad Co. v Roosevelt County was working its way through the judicial process, the Legislature met and amended section 11-2008 RCM 1947. As can be seen from the pertinent portion of **Chapter 75, Laws of 1957** set out below, the Legislature specifically addressed the notice and opportunity to be heard issues which the court would find rendered the earlier version of statute unconstitutional.

As amended section 11-2008 RCM 1947 provided in pertinent part:

Section 1. That Section 11-2008, Revised Codes of Montana, 1947, relating to fire districts in unincorporated territory, towns and villages, as amended by Section 1 of Chapter 75 of the Session Laws of 1953, and the same is hereby amended to read as follows:

**“11-2008. (5148) Fire Protection---Creation of Fire Districts—Contracts With Cities and Towns—Dissolution and Change of Boundaries.** (a) The board of county commissioners is authorized to establish fire districts in any unincorporated territory, town or village *upon presentation of a petition* in writing *signed* by the owners of fifty percent (50%) or more of the area included within the proposed district who constitute a majority of the taxpayers who are freeholders of such *area*, and whose names appear upon the last completed assessment roll; *the board shall within ten (10) days after the receipt of such petition; give notice of the hearing thereof at least ten (10) days prior thereto by causing notices of the time and place of such hearing to be posted in at least three (3) of the most public places within the area proposed to be established as a fire district, and published at least once not less than ten (10) or more than twenty (20) days prior to the time of said hearing in a newspaper regularly published in the county in which such proposed district is situated. The board shall proceed to hear the said petition at the time set therefore, or at any time within five (5) days thereafter to which the same shall have been postponed or continued with due notice and may grant the same unless it shall be established there that the petition bears insufficient signatures as above required, or, if originally sufficient, that by reason of written withdrawals*

*thereof it has become insufficient. The board shall render its decision within thirty (30) days after said hearing.*

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(Italicized material added by Chapter 75, Laws 1957)

Because these amendments were made while Great Northern Railroad Co., supra, was pending before the courts, the Supreme Court very clearly and unequivocally limited the holding of the case to section 11-2008 RCM 1947 as it existed prior to the 1957 amendment, saying: "...section 11-2008, prior to the 1957 amendment, was and is unconstitutional..." Great Northern Railroad, supra, 134 Mont. at 355, 332 P2d at 506.

To the best of my knowledge, based on research, no case has found section 11-2008 RCM 1947, as amended, unconstitutional.

The original creation of the Missoula Rural Fire District occurred in 1961 and followed the procedure specified in Section 11-2008, RCM 1947 as amended by Chapter 75, Laws of 1957.

Attached to this letter are:

- 1) A copy of the notice given of a hearing on the question of creating the district (Comm Journal, Book A-A, page 392, February 1, 1961);
- 2) A copy of the minutes of the hearing on the question of creating the fire district (Comm Journal Book A-A, page 403, February 16, 1961); and
- 3) A copy of the resolution establishing the district (Comm Journal, Book A-A, pages 409-410 February 29, 1961)

Quite clearly the Missoula Rural Fire District was not created under the 1953 statute found to be unconstitutional by the Supreme Court in Great Northern Railroad, supra. Rather it was created under the statute, as amended in 1957, which fully addressed the problems found by the Supreme Court with the earlier version and which was specifically exempted from the holding in Great Northern Railroad, supra. There simply is no basis for your repeated allegations that the Missoula Rural Fire District was created by use of an unconstitutional statute. Even your own quotations from Great Northern Railroad contain the specific limitation on the finding of unconstitutionality that refers to the statute "before the 1957 amendment." Given this clear language, I can only conclude that you believe that the Missoula Rural Fire District was created before 1957. It was not; it was created pursuant to the amended statute in 1961.

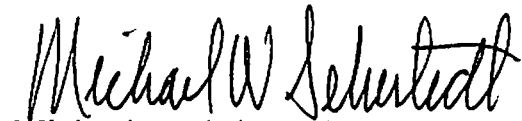
To your suggestions that section 11-2008 RCM 1947 "has never been changed" I can only refer you to Chapter 75, Laws of 1957 which quite clearly amends section 11-2008 RCM 1947.

I am puzzled by your suggestions that the Attorney General or other executive officers could "remove an unconstitutional statute from the books." While of course the executive branch is without power to enforce a statute that the judicial branch has found to be unconstitutional, the "removal" of a statute is vested in the legislative branch and not the executive.

My suggestion to you is that if you believe section 7-33-2109 MCA is unconstitutional, then you bring an action to establish that unconstitutionality. Given that section 7-33-2109 is a recodification of a statute amended in 1957 specifically to address the problems found with the 1953 version of statute, I would respectfully suggest that you offer substantive constitutional objections to the current version of the statute and not continue to rely on the fact that an earlier version of the statute was unconstitutional. While I have no doubt of the outcome, it would at least put these claims to rest permanently.

Sincerely,

FRED VAN VALKENBURG  
Missoula County Attorney



Michael W. Sehestedt  
Deputy County Attorney

MWS/sjs

Enc.

CC: Governor Brian Schweitzer  
Attorney General Mike McGrath  
Missoula County Commissioners  
Ravalli County Commissioners  
Stacey Mueller, Publisher, Missoulian  
Missoula Rural Fire District

February 1, 1961

The Board of County Commissioners of Missoula County, Montana, continued in session at 10:00 A. M.

H. W. Stoutenburg, Chairman - Present  
Wm. Lucier, Commissioner - Present  
G. D. Shallenberger, Commissioner - Present  
Martin S. Behner, Clerk - Present

The minutes of the previous continued session were read and approved as read.

#### RE. CIVIL DEFENSE

A group of women met with the Board to recommend names of persons to be considered for the post of City-County Civil Defense Director. Mrs. Vi Sorge, who has been serving as Director of Civil Defense women's activities, was named as a prospective appointee.

#### NOTICE OF HEARING

The petitions requesting the establishment of a fire district in South and Southwest Missoula having checked out according to law with over 50 percent of the signatures required, the Clerk was instructed to publish and post the following Notice:

#### NOTICE OF HEARING

THIS is hereby given that there will be a public hearing at 10:30 A. M., February 16th, 1961, in the Office of the County Commissioners, Missoula County, Missoula, Montana, on petition for establishment of a fire district, said petition requested in accordance with Section 11-2008, Revised Codes of Montana, 1947, as amended, and signed by more than 50 percent of property owners in the area included within the boundaries of the proposed district described as follows:

Commencing at a point on the south bank of the Clark Fork River at its confluence with the Bitterroot River; thence easterly up the southerly bank of the Clark Fork River to a point where it intersects the City Limits of the City of Missoula, Montana; thence along the westerly boundary of the City limits of Missoula, Montana to the intersection of 39th Street and Whitaker Drive; thence one-half mile South along the east boundary of Section Five (5), Township Twelve (12) North, Range Nineteen (19) West to a point; thence one and one-half miles due West to a point; thence one mile South to a point; thence three miles West, more or less, to the south bank of the Bitterroot River; thence down the easterly shore of the Bitterroot River to its confluence with the Clark Fork River, the point of beginning.

That all interested persons should appear at said time and place above mentioned to be heard for or against the establishment of said proposed fire district.

By Order of the Board of County Commissioners, Missoula County, Montana.

S/ Martin S. Behner  
County Clerk, Missoula County,  
Montana

Published:  
Feb. 2nd through 14th, 1961

#### MEETING OF SCHOOL COMMISSION

The Board adjourned as a Board of County Commissioners and met as the Missoula County School Commission at 10:30 A. M., with Superintendent of Schools Robert Watt, Roger Christensen, Superintendent of Frenchtown School, and two other interested Frenchtown residents.

Commissioner Shallenberger stated that, in his opinion, the youth of Missoula County would be better served if this county presented a unified monolithic policy at the level of secondary education, and that the point he made from reading Section 75-4602 was that it is the mandatory duty of this Commission to divide and establish one or more high school districts.

Superintendent Watt agreed with Commissioner Shallenberger and added that the division or the setting of boundaries which the Commission is required to do must be done in a manner satisfactory to the State Department of Public Instruction, which is almost impossible to arrive at an ideal set-up of high school districts, therefore he felt a compromise on the boundary problem would be necessary in order to insure the proper interpretation of the law and the workability of the plan.

Chairman Stoutenburg stated that when you start districting the county, you are doing away with the County High School. He asked if they were doing the right thing, and cited Frenchtown as an example of handling this matter in the proper way.

Roger Christensen stated that he had a letter from the State Superintendent of Public Instruction, Harriet Miller, in which she stated that it would not be abolishing the County High School, nor would it affect the operation of Missoula County High School or have any bad effects. Many people believe, he said, that dividing the county into high school build-

STATE OF MONTANA }  
 COUNTY OF MISSOULA } AND:  
 CITY OF MISSOULA }

I hereby certify that the above and foregoing is a true and correct copy of Resolution No. 2209 as the same appears upon the records of my office as City Clerk for the City of Missoula, Missoula, Montana.

I hereunto set my hand and the seal of the City this 15th day of February, 1961.

SEAL

S/ Alice M. Jaqueth  
 City Clerk

The Board discussed the above resolution with County Attorney Jack Pinsoneault and it was found that the starting point in the description is in error and should read "northwest corner, NEIORT".

The Report of the County Clerk and Recorder for the month of January, 1961, was examined, approved and ordered filed by the Board.

#### HEARING ON PETITION FOR FIRE DISTRICT

At 10:30 A. M., this being the time as advertised for hearing petitions for creating a fire district in the area described as:

"Commencing at a point on the south bank of the Clark Fork River at its confluence with the Bitterroot River; thence easterly up the southerly bank of the Clark Fork River to a point where it intersects the City limits of the City of Missoula, Montana; thence along the westerly boundary of the City limits of Missoula, Montana, to the intersection of 39th Street and Whitaker Drive; thence one-half mile South along the east boundary of Section Five (5), Township Twelve (12) North, Range Nineteen (19) West to a point; thence one and one-half miles due West to a point; thence one mile South to a point; thence three miles West, more or less, to the south bank of the Bitterroot River; thence down the easterly shore of the Bitterroot River to its confluence with the Clark Fork River, the point of beginning."

the Board met with freeholders from the district above, among whom were Dr. Pruyn, Ed Shults, M. S. J. R. Bush, Leo Thomas, Jim Thompson, Louis A. Colvill, A. S. Getchell, and others.

Dr. Pruyn stressed the need for fire protection in the area petitioned for, as evidenced by the number of signatures obtained. Mr. Shults requested that the Bitterroot area not be included as they already have been promised fire protection by the City.

It was brought out that the Port equipment cannot be used for fire protection until there is equipment set up in the new district, then they will act in cooperation.

In answer to questions regarding the cost, etc., Chairman Stoutenburg stated that when the district is set up, they would appoint five commissioners to handle it. They will get the cost, the equipment needed, the assessed valuation of the area included, and set the millage basis from that.

Mr. Colvill stated that meetings had been held in the area for some time regarding this district, and at their last meeting they had appointed a number of prospective people that would act on the commission to be set up. Opposite each name they had put down the district in which they live, and it was hoped that in appointing the five commissioners the Board would try to get people from the different areas in the district.

Mr. Getchell brought out that if all the industrial activities in the area were to be included in the district, more equipment would be needed for that.

Motion was made by Commissioner Shallenberger, seconded by Commissioner Lucier and carried unanimously, "that the matter be taken under consideration until a future date."

#### WELFARE

The commissioners attended the Welfare Board meeting in the afternoon and examined, approved and ordered filed a list of cases disposed of.

#### LEGAL CASES

The Board this date notified L. G. Zipporian that his lease on county property determined that:

That certain property lying south and east of Highway #93 and north and west of the Bitterroot Branch R. R. and joining the property now owned by the lender lying on the south, forming a partial triangle containing an area of approximately 17.8 acres

was terminated on March 1st, 1961, for the reason that this property is to be sold.

RE. INTERCHANGE ROUTE

Don Wilson of the Chamber of Commerce met with the Commissioners regarding the routes to be used by the interchange.

FIELDMEN FOR ASSESSOR

Motion was made by Commissioner Shallenberger, seconded by Commissioner Lucier and carried unanimously, "that the request of County Assessor Al Jungers for fieldmen for assessment work be granted."

PETITION

Petition was received this date for the creation of a Rural Special Improvement District in Lake Homesites as follows:

1. Pave Lake Drive from 39th Street to its terminus, including the cul-de-sac.
2. Construct sidewalks five feet wide with vertical curbs on both sides of the street from 39th Street to the cul-de-sac.
3. Construct a roll curb without sidewalks around the cul-de-sac.

Proposed work to be assessed over a period of five years for the street and ten years for curbs and sidewalks.

The Board handled regular county business and signed claims during the day.

Motion made by Commissioner Lucier, seconded by Commissioner Shallenberger and carried unanimously, "that the Board continue in session at 10:00 A. M., February 28, 1961."

H. W. Stoutenburg  
Chairman

Martin S. Behner  
Clerk

February 28, 1961

The Board of County Commissioners of Missoula County, Montana, continued in session at 10:00 A. M.

H. W. Stoutenburg, Chairman - Present  
Wm. Lucier, Commissioner - Present  
G. D. Shallenberger, Commissioner - Present  
Martin S. Behner, Clerk - Present

The minutes of the previous continued session were read and approved as read.

RESOLUTION AND APPOINTMENT

With regard to the petition for establishment of a fire district in southwest Missoula, hearing on which was held at 10:30 A. M., February 16, 1961 and the matter taken under advisement, the Board adopted the following resolution and appointment:

R E S O L U T I O N   A N D   A P P O I N T M E N T

Re:        Suburban Fire Organization  
             Missoula County

WHEREAS, the Board of County Commissioners of Missoula County, Montana, being desirous of cooperating with Federal, State and municipal protection agencies operating within the County of Missoula, State of Montana, to provide means and methods of safeguarding public and private property, in accordance with Section 11-2008, Revised Codes of Montana, 1947, as amended, and

WHEREAS, there has been presented a petition for the creation of a fire district, signed by owners of over fifty per cent (50%) of the area included within the proposed district, boundaries of which are hereinafter set forth, said owners constituting a majority of the taxpayers who are freeholders of such area, and whose names appear upon the last completed assessment roll, and

WHEREAS, said petition appears proper on its face, and hearing on same having been held at 10:30 A. M., February 16, 1961, at which time no protests were made against the creation of said proposed fire district,

NOW THEREFORE, BE IT RESOLVED, by the Board of County Commissioners of Missoula County, Montana, under the provision in said Section 11-2008 authorizing the establishment of fire districts, upon motion made by Commissioner Lucier, seconded by Commissioner Shallenberger



and carried unanimously, "that a Suburban Fire District be established and designated in accordance with the petition, in the area described as follows:

Commencing at a point on the south bank of the Clark Fork River at its confluence with the Bitterroot River; thence easterly up the southerly bank of the Clark Fork River to a point where it intersects the City limits of the City of Missoula, Montana; thence along the westerly boundary of the City limits of Missoula, Montana to the intersection of 30th Street and Whitaker Drive; thence one-half mile South along the east boundary of Section Five (5), Township Twelve (12) North, Range Nineteen (19) West to a point; thence one and one-half miles due West to a point; thence one mile South to a point; thence three miles West, more or less, to the south bank of the Bitterroot River; thence down the easterly shore of the Bitterroot River to its confluence with the Clark Fork River, the point of beginning.

BE IT FURTHER RESOLVED, upon motion made by Commissioner Shallenberger, seconded by Commissioner Lucier and carried unanimously, "that we appoint the following residents of the area as Trustees for said fire district:

Dr. Earl Bruyn      William Walterskirchen      John Pomajevich      Kenneth Richardson  
Louis Colvill

all said appointees to serve without compensation from Missoula County, Montana, and all said appointments to be effective on this date and to continue until written resignation or resignations are submitted to and accepted by this Board or until revocation or revocations of said appointments are officially made by this Board, or until successors are elected and qualified as provided in Section 11-2010, Revised Codes of Montana, 1947, as amended, and

BE IT FURTHER RESOLVED, that said appointees shall immediately proceed with the matter of carrying out the duties imposed upon them by said Section 11-2010, as amended, to the extent that the purposes and intent of said law be fully complied with and properly executed.

Done at Missoula, Montana, this 28th day of February, 1961.

BOARD OF COUNTY COMMISSIONERS  
MISSOULA COUNTY, MONTANA

S/ H. W. Stoutenburg, Chairman  
S/ Wm. Lucier, Commissioner  
S/ G. D. Shallenberger, Commissioner

ALSO:

S/ Martin S. Behner  
Clark and ex-officio member  
of the Board of County  
Commissioners.  
S/

#### ACCEPT BID ON PICKUP TRUCK

After further consideration of the bids received by the Board on the 1961 1/2 Ton Pickup, motion was made by Commissioner Lucier, seconded by Commissioner Shallenberger and carried unanimously, "that we accept the bid of H. O. Bell Company in the amount of \$1638.00, being the lowest bid received, and that the companies be notified of this acceptance."

#### CONSTRUCTION AUTH. AT PINEVIEW NURS. HO.

Motion was made by Commissioner Shallenberger, seconded by Commissioner Lucier and carried unanimously, "that authorization is hereby granted, upon the request of the Supervisor, Pineview Nursing Home, for the construction of a partition in the north room at a cost of \$292.00, which amount is to be paid from the county building budget."

The Board handled regular county business during the day.

Motion made by Commissioner Lucier, seconded by Commissioner Shallenberger and carried unanimously, "that the Board continue in session at 10:00 A. M., March 1st, 1961, after approving the following list of claims for the month of February:

#### GENERAL

|                             |                     |         |
|-----------------------------|---------------------|---------|
| Industrial Accident Bd.     | Prem. (Oct-Nov-Dec) | 807.14  |
| West. Mont. Natl. Bank      | Fed. Tax            | 382.27  |
| St. Bd. of Equalization     | St. Tax             | 304.50  |
| Gen. Sec. Div.              | Sec. Sec.           | 344.38  |
| Int. Employees Ret. System  | Ret.                | 2438.47 |
| Mont. Teachers' Ret. System | "                   | 39.94   |
|                             | Prem.               | 830.35  |